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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 98

SARAH PRINCE, *Appellant*

v.

COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE SUPREME COURT OF MASSACHUSETTS
FOR THE COUNTY OF PLYMOUTH

Appellant's
PETITION FOR REHEARING

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Cardozo, Benjamin N., *The Nature of the Judicial Process* (Yale Univ. Press, New Haven, 1921), pp. 22-23	18
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Attorney General of the United States, Address to the Chief Justice and Associate Justices at ceremonies commemorating the 150th Anniversary of the Supreme Court, Feb. 1, 1940	19
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MAY IT PLEASE THE COURT:

Within the time fixed by the order extending time for filing a petition for rehearing, appellant now files and presents this petition. The Court is requested to grant the same, order a rehearing and direct a reargument of the cause for the r e a s o n that many important matters urged upon the Court have been overlooked in arriving at the decision. Grave error has been committed by this Court. Appellant urges this petition on the following

Grounds

ONE

This Court committed grave error in failing and refusing to hold that the statute is unconstitutional as construed and applied because it abridges and denies appellant's right to educate, teach and direct the spiritual welfare of the child, to maintain a family and to discharge her moral obligations as personal guardian of said child and the child is denied the right to the benefits of such relationship, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

This Court committed grave error in failing and refusing to hold that the statute is unconstitutional as construed and applied because it abridges and denies appellant's and the child's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience, contrary to the First and Fourteenth Amendments to the United States Constitution.

THREE

This Court committed grave error in failing and refusing to hold that the statute is unconstitutional as construed and applied because it abridges and denies appellant's and the child's privileges, rights and immunities secured by the Constitution, in violation of the *equal protection* clause of the Fourteenth Amendment to the United States Constitution.

Discussion and Reasons Supporting Petition

This motion is a further step in the judicial process of reviewing "another episode in the conflict between Jehovah's witnesses and state authority", and presents the issue: Whose law is supreme? That of Jehovah God or man? That of the people expressed in the Constitution or that of their agents expressed in statutes and misapplied by executive officers? Which must yield?

When the majority-opinion covering the controversy is pulled back and the light of reason and realism shines in upon the facts it becomes apparent that the conclusion reached in the opinion is the result of a synthetic process of reasoning foreign to judicial process and that the appellant and the child were engaged in acts of worship of Almighty God in a proper place, in such a manner as not to expose the child to any clear and present danger of injury to her body or mind, and which activity does not exceed the limit by any sort of abuse within the competency of the state to prohibit. The streets are the natural and proper place for the exercise of preaching activity by Jehovah's witnesses through dissemination of printed information and opinion, and this Court has many times so held. Use of the streets for this purpose is not impaired because they "have not become their religious property". While it has been contended that the streets may be used by Jehovah's witnesses, in common with others, to preach to the people in the same way as tent and temple are used, it never has been asserted that the right depended upon title thereto. Nor have Jehovah's witnesses before this Court claimed ownership of the streets or that they were their "religious property". It is also plain that the state or city does not own absolutely the streets and public highways so as to exclude Jehovah's witnesses therefrom. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating

thoughts between citizens and discussing public questions." *Hague* v. *C, I. O.*, 307 U. S. 496.

Government and state regulation as permitted to flow in the fields of economic welfare and commerce have been given a rather broad bed in which to flow to reach aims of the government permitted by the Constitution. The courts have been allowed by the Constitution to follow the direction of the legislature in many changes at various points along the stream of time and constitutional history in such fields. The Court has erroneously followed the legislature and the misguided executive agents of Massachusetts in this case. This action is not permitted by the Constitution, because the government has reached a different field of rights, that is to say, "civil rights."

In this enclosure of CIVIL RIGHTS and fundamental personal liberties secured by the express guarantees of the First Amendment, there is not established a broad channel in which the government and the courts may operate according to their discretion. The people, by these specific constitutional provisions, have definitely narrowed the channel of regulation and governmental activity and walled them in by high banks of rock on both sides of the governmental waters. This is to prevent a change of course of the stream and to keep the way straight and narrow. If the government gets out of its fixed course in these precious fields, there immediately arises a presumption of invalidity and unconstitutionality to throw back the stream of regulation into the fixed channel property made by the people through their Constitution. The statute in question and the opinion of this Court approving same are mere floodwaters which are out of the course established by the people. It is the purpose of this motion to show how they should be rightly returned to their proper place and recede from the field of fundamental personal liberties belonging to appellant.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political contro-

versy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." (Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638-640. See, also, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152; *Busey* v. *District of Columbia*, 138 F. 2d 592.)

In this connection it is noticed that the Court entirely failed to consider and discuss the presumption of invalidity that throws back the statute misapplied by Massachusetts in this case. It should be observed that the Court failed to discuss whether or not there was evidence of clear and

present danger of substantial injury to the child from the activity in which she was engaged. In fact, there is no showing of clear and present danger in the record. Any substantial dangers and "the crippling effects" of child labor in the public streets are not shown to have a connection with the practice of worship by the child upon the street under direction of the parent. The dangers imputed are imaginary, chimerical and too remote to form a reasonable basis for the restriction. Moreover, "rational basis" has been held by the Court not to be adequate to support the prohibition of freedom of worship guaranteed by the First Amendment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638-640.

In criminal actions where constitutional presumption of innocence exists and in which it is shown that the restricted activity constituted an exercise of rights guaranteed by the Constitution in the First Amendment, there can be no substitution of presumed dangers, imagined dangers, possible perils, judicial notice of hazards in kindred fields and chimerical risks that are attendant in all phases of life, to justify an abridgment of the constitutional right for which protection is claimed. If the judicial process employed by the Court in creating a 'dangerous situation' in this case were employed in other situations of family life, the right to the custody of children could easily be denied parents on the theory that the home is a dangerous place and a situs of more deaths and injuries to children than are orphan asylums.

The burden is upon the Commonwealth of Massachusetts to prove affirmatively by evidence that the child was threatened by a clear, present and substantial injury arising from its participation in the protected activity. The principle was properly applied under direct mandate of this Court by the United States Court of Appeals in *Busey* v. *District of Columbia*, 138 F. 2d 592, where it is said:

"The record does not show what the expenses of licensing and regulation are. We must therefore determine who had the burden of proving them. . . .

"It does not necessarily follow that the present appellants have the burden of proving that the license fees which the District of Columbia imposes on their sales exceed the expenses of licensing and regulation. . . .

"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

The appellee wholly failed to discharge this burden and it is beyond the authority of this Court to FILL IN THE GAP in the proof by presumptions and judicial notice misapplied after the argument and submission of the case. A decision of such magnitude and involving such precious rights necessarily must be based on realities and not chimera. Fantasy cannot be substituted for fact. Nor can fiction take the place of proof.

It is wholly unreasonable to punish a parent for teaching and leading the child in acts of worship which do not impinge on the laws of morality and at the same time leave the way open for other parents to leave their children wandering about upon the streets, accompanying them shopping, going alone or with others to movies and engag-

ing in other acts far more injurious to the child than following its parent in acts of worship. The evils attendant to public worship by the child on the streets with its parent are not shown to carry with them any greater dangers than a parent's taking the child along the sidewalk with him for any of the thousands of other lawful purposes for which these public walks are used. It must be remembered that not only was the activity pursued by the appellant lawful, but also that it is guaranteed, according to this Court, against abridgment, by the Constitution.

If punishment of the parents is designed to prohibit or discourage them from taking their children with them in their Christian work so as to protect the interests of the child, such punishment is founded on a false premise. When a child is left at home alone there always lurk many dangers which are too numerous to mention and far greater than if the child is taken along with the parent. Who will deny that there will be less danger to the child when safely with its parent on the street than when put by itself in a movie or in an automobile while the parent pursues the lawful and benevolent activity of preaching the gospel?

It is noticed that the Court did not bring attendance of children at picture shows, where the child is subjected to views of murder, immorality, etc., and the performance of other activities, within the anathema of its child-welfare program expressed in the opinion. It is beyond the competency of the government, legislative, executive or judicial, to enter into the sacred fields of family relationship and dictate as to religious activity within the family unless it is shown to seriously and immediately affect the health, welfare or morals of the child or other persons. There is no proof or intimation of the existence of any such dangers in the activity of appellant.

It is to be observed that the judicial process employed in reaching the conclusions against appellant in this case would also bring within the anathema of child labor laws the activity in the public technical schools where labor and

manual training of various sorts are prescribed as a part of the course of study.[1]

The loose method of reasoning employed so as to raise certain hypothetical dangers to justify the prohibition of the exercise of the right to worship Almighty God is the erection of a dangerous precedent which can easily be extended to other situations entirely within the confines of the sanctity of the home and family and beyond reach of the state. The lack of proof of clear and present danger in this record cannot be frittered away on the assumption that the activity "may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury".

The above-quoted part of the majority opinion is just another proof of the far-fetched reaching of the Court, *'straining-at-the-gnat-and-swallowing-the-camel'* process in manufacturing dangers that are not shown to exist or even suggested in the record as a basis of sustaining the conviction of appellant. It has heretofore been thought that in a criminal case the guilt of a person depended on his own conduct and not that of others.

If this fantastic theory be sustained, then there is no end to which the people can be swept from their liberties guaranteed by the Constitution. In effect it interns the law-abiding citizen and imprisons his children so as to deny their liberty in order to permit the law violator to have open streets up-

[1] General Eisenhower and the Secretary of the Treasury might also be subjected to prosecutions under state laws prohibiting child labor for encouraging children of school age to act as sales agents of war bonds in the war loan drives conducted by the Government. TELEGRAM by General Eisenhower to Clifford E. Paige, Chairman, U. S. Treasury War Finance Committee, Brooklyn, New York, received January 27, 1944, from London: "Will you please convey to the four hundred fifty thousand Brooklyn school children, who are acting as sales agents in the Fourth War Loan Drive, my commendations for their soldierly conduct? In volunteering for this work and in carrying on until their objective is achieved, they are exhibiting the fighting spirit that will bring victory to our cause."

on which to run loosely and not find within his sight a person lawfully using the streets. The Court has inferred that the city of Brockton is likely to be overcome by mobsters and mob violence to such an extent that the law-enforcing agencies cannot protect the innocent in the exercise of their constitutional rights; and that, therefore, Jehovah's witnesses should be enjoined from the leading of their children in public worship of Jehovah God. This danger had never been suggested by the appellee or injected into the proceedings in this case until the Court spoke.

The Court has overlooked the fact that the child in this case had reached a point of sufficient understanding that her conscience dictated to her that she must engage in preaching the gospel publicly by distributing literature. She believed that she must thus worship Jehovah God. The acts were the result of a conscience molded according to instruction given by Almighty God in His written Word. The child did not go because the mother asked her to go. Appellant did not force, persuade or coerce the child into publicly preaching. It was a voluntary act, entirely. The child in this respect was like the apostles, one of whom said: "For though I preach the gospel, I have nothing to glory of: for necessity is laid upon me; yea, woe is unto me, if I preach not the gospel!"—1 Corinthians 9:14, 16.

The prophet Ezekiel declared that should he fail to preach publicly the commandments of Almighty God the blood of the innocent would be upon his shoulders, which would result in his own everlasting destruction at the hand of Jehovah.—Ezekiel 33:6-16.

The youthful prophet Jeremiah was confronted with the threatening laws and decrees of unfaithful Jerusalem and the conflicting command of Almighty God. He said: "Ah, Lord GOD! behold, I cannot speak: for I am a child. But the LORD said unto me, Say not, I am a child: for thou shalt go to all that I shall send thee, and whatsoever I command thee thou shalt speak." (Jeremiah 1:6, 7) Later he recounted: "But his word was in mine heart as a burning fire shut up

in my bones, and I was weary with forbearing, and I could not stay." (Jeremiah 20:9) The voluntary position of Betty Simmons is analogous. (R. 14-20) It must be observed that youthful Jeremiah was arrested, prosecuted and imprisoned for his failure to comply with the decrees of the land, which was because of his faithfulness in executing commands of Jehovah God. In further proof of the voluntary action of the child it should be remembered that the child cried to go with Sarah Prince. (R. 14, 17, 18)

A distinction should be made between a child that is allowed to engage in street trades for the purpose of earning money and a child who accompanies its parent in public worship by preaching. Nor is the situation like that where the parent forces the child to engage in street trades to earn money to turn over to the parent. Such situations are not similar to that here.

The action of the child was the result of its individual and direct covenant obligation to Jehovah God. The individual duty of the child to Jehovah God does not depend on the act of the parent. These obligations have been fully discussed in the main brief (pages 27-33), and reference is made to them. If the child desires to worship Almighty God according to dictates of its conscience, the parent cannot interfere therewith or prevent it. The Supreme Command of Jehovah God to the parent is: "And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." (Ephesians 6:4) "But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea." (Matthew 18:2-7) "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God."—Luke 18:16.

It is plain that the activity and worship here involved is the result of the working of the spirit and Word of Almighty God upon the child, and not coercion from the appellant. To punish appellant for the acts of the child is to

inflict pains and penalties upon her for the acts and conduct of another which she has no right to control according to her understanding of the law of Almighty God which she is bound to obey under penalty of everlasting death. This Court cannot protect or shield appellant against the punishment of Almighty God for violation of His laws, and it has no authority to issue an edict that warrants the state to compel her to do acts which will result in her everlasting destruction or punish her for failing to obey her Maker's Supreme Law. This proposition is older than this Court. It was well stated by Mr. Mason in Virginia in 1772 when he appeared as counsel for the Indians in *Robin* v. *Hardaway*, reported by Thomas Jefferson in 1 Jeff. (Va.) 109 at page 114. There he said: "The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice."

So says Blackstone: "Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. . . . This principle therefore has more or less extent and effect . . . as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. . . . This law of nature, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, at all times. *No human laws are of any validity if contrary to this;* and such of them as are valid derive all their force and all their authority, mediately or immediately, from the original. . . . *That is to say no human laws should be suffered to contradict these.*" [Italics added] *Commentaries* (Chase 3d ed.), pp. 5-7.

It cannot be overlooked that the Court is indirectly attempting to sanction the prohibition of the child's worship

of Almighty God. This raises an ominous threat against the very life of the child and throws her into the path of the machinery of the state devised for taking delinquent children away from their parents. The Court is urged to adopt the view analogous to that of Judge Lehman of the New York Court of Appeals, concurring in *People* v. *Sandstrom* (1939) 279 N. Y. 523, a case involving the analogous question of whether the parent could be prosecuted for teaching the child the Creator's commands written in the Bible that prohibit saluting a flag. In that case Judge Lehman said:

"She asks only that she be not compelled to incur the wrath of her God by disobedience to His commands. . . . The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."

Appellant suggests that the Court reconsider the dilemma in which it has placed her and her charge, wherein they are confronted with a predicament of conflicting punishments.

The course heretofore taken by appellant is dictated by the Lord Christ Jesus, who said: "Be not afraid of those who kill the body, but cannot destroy the [future] life; but rather fear him who can utterly destroy both life and body in Gehenna." (Matthew 10: 28, *Emphatic Diaglott*) It is because of this principle that the apostles, as faithful followers of Christ Jesus, when faced with the conflicting commands of Almighty God and "state authority", said: "We ought to obey God rather than men." (Acts 5: 29) "And daily in the temple, and in every house, they ceased not to teach and preach Jesus Christ." (Acts 5: 42) The decision of the national court to dismiss charges brought against the apostles at the time of their trial should be persuasive of a similarly realistic attitude to be taken on this parallel

occasion by this high court. Gamaliel said: "Refrain from these men, and let them alone: for if this counsel or this work be of men, it will come to nought: but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God."—Acts 5:38, 39.

The basis for infringing upon the acts of a person dictated by conscience molded by Scriptural counsel and God's law, exists only when it is made apparent that the overt acts practiced break out against the peace, safety, health and morals of the community or threaten immediate danger of such dire consequences. If no such results are apparent, the consequent incompetency of the state to protect the person against punishment by Almighty God for disobedience to Him dictates that "state authority" cannot compel obedience to a law that works such a dilemma.

The Court has declared that young persons or children cannot become Jehovah's witnesses, but that only adult persons can reach such a status. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." (RUTLEDGE, J., for the majority.) This statement overlooks entirely the fact that the action of the child was entirely voluntary. This Court's decision "martyrs"[2] the parent for the act of the child, which act of the child the parent cannot prohibit, prevent or stop without transgressing the law of Almighty God. Besides denoting 'one who voluntarily suffers death as the penalty of refusing to renounce his religion or a tenet, principle, or practice belonging to it', the word *martyr* (from the Greek) means simply "witness". "To be a martyr, signifies only to witness the truth of Christ."—*Webster's Revised Unabridged Dictionary.*

It is fundamental that a child's early years are the most

[2] 'Puts to death for adhering to some belief, faith, or profession, especially Christianity; makes a martyr of.'—*Webster's New International Dictionary* (1944).

critical of its lifetime, for during that period it must be taught the principles its parents expect shall guide it throughout life. It is axiomatic that a parent should teach a child the way it should go when it is young and that it will not thereafter depart from the way of righteousness. "Train up a child in the way he should go: and when he is old, he will not depart from it." (Proverbs 22:6) "Remember now thy Creator in the days of thy youth, while the evil days come not, nor the years draw nigh, when thou shalt say, I have no pleasure in them."—Ecclesiastes 12:1.

This teaching and authority of training up a child is not confined to mere indoctrination, but also extends to guiding the child in right conduct. If a parent must wait until the child is above the age of eighteen years to teach it the commandments of Almighty God and to direct it in the practices those commandments dictate, it may be too late to accomplish the purpose of such teaching. The principle announced by the Court is akin to theory and decree enforced under punishment in Soviet Russia where by law no child is permitted to practice any religious principle publicly or privately or to become a candidate for the priesthood in school or otherwise until 18 years of age.[3]

If in the field of secular education "state authority" is allowed to direct the activity and work of children in mechanics, manual training and other employments, then by force of the same reason the parent not only must be left free to teach principles but must also be allowed to direct and train the child in the spiritual field by assisting it to *practice* God-given precepts and Christian principles. The rule announced by this Court is such that it permits the proscribing of actions on the ground that they are improper acts of worship for the child. Such are radical principles of government that scarcely any religious body can accept.

"These and all others except the public proclaiming of

[3] See *Newsweek*, December 27, 1943, pp. 68-69; *Pathfinder*, September 25, 1943; *Newsweek*, February 1, 1943, "Religion"; Evans, *Religion in the U. S. S. R.*, Russia Today Society, London.

religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision." The dangers of the majority opinion in direction of state regulation of the church are recognized by the Court when it enacted the above proviso at the end of its opinion. The handling of this delicate situation by tying on the 'saving clause' at the end to avoid misunderstanding of the Court's efforts is very similar to walking on eggs and at the same time trying not to break any. That feat cannot be done.

This straining effort of the Court to proscribe only activity similar to that carried on by Jehovah's witnesses may not protect the Court from the dangerous consequences of the logical extension of the principle announced when applied to other facts which will be reached by the force of the strange creature nurtured by the majority opinion in this case.

The principle thrown out by the Court upon the public waters is certain to wash back to the door of the Court in due time in a more difficult situation. This is necessarily the case when it is likely that other steps may be taken to deprive the parents of the custody of their children for permitting them to engage in acts of public worship as commanded by Almighty God and which the parent cannot prohibit under the pains of everlasting death at the hand of Almighty God pursuant to the execution of His perfect laws which require obedience at all costs. The law of Jehovah God does not change and needs no private interpretation. There is no opportunity for the creature to escape punishment by a change of view of some expounder of the law.

This presents a foreboding of national consequences very similar to that which flowed from the opinion of this Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586. A brief summary of the effects of that decision is given in appellees' main brief in *West Virginia State Board of Education* v. *Barnette*, No. 591 October Term 1942, at pages 71-84. The Court can take judicial notice of the fact that

every state in the Union has child labor laws very similar to the Massachusetts statute here in question. Many cities have local ordinances containing similar provisions. (*McSparran* v. *Portland*, No. 597 October Term 1942, certiorari denied March 1, 1943, 318 U. S. 768; rehearing denied June 14, 1943, 319 U. S. 780.) On the authority of this Court's recent opinion the prosecutor for a midwestern city has placed on the calendar for trial certain proceedings pending in the Probate Court for the purpose of having several children of Jehovah's witnesses declared wards of the state under the delinquency laws for violation of a street-trades ordinance of that city based on public-street preaching by Jehovah's witnesses. Those otherwise perfectly demeanored children, who are attending school regularly, face the clear and present danger of being taken away from their parents, removed from public school and placed in a county training school and compelled to associate with delinquent children, criminals and others of base morals, because of their faithfulness to Almighty God by the performance of proper and harmless acts of proclaiming God's Word upon the public sidewalks.

These dire consequences that suddenly appear on the horizon give a reasonably clear picture of what is to follow from this decision, and should be persuasive to this Court to reconsider the doctrine announced in this case. The factitious and specious argument of the majority can hardly be said to justify the certain injury that is to follow this decision. Chief Justice Taney said that this Court's opinion "is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported". (*The Passenger Cases*, 7 How. 283, 470) Justice Brandeis declared that the Court "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judi-

cial function." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406.

Justice Cardozo, while a judge of the New York Court of Appeals, wrote: "Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience are sacrificed mercilessly and thrown into the void. . . . Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. . . . The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined." *The Nature of the Judicial Process*, New Haven, 1921, pp. 22-23.[4]

When the injuries that might be suffered from an erroneous decision in a field of human relations and constitutional rights are so delicate and tender as these and which may prove to be wholly irreparable, it is not wise nor necessary to wait for the proof of the error of the principle by trial-and-error method. It did little good for the emperor at Rome to repent, change his mind and declare that he had entered an erroneous decree in respect to the Christians after they had been pitched to the lions and torn limb from limb.

It is the duty of counsel "who strive at your bar", who "venture to think ourselves also in some measure consecrated to the task of administering justice", to bring these matters to the Court's attention. "Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronouncements of this Court. It is for us to bring the cases and to present for your corrective action

[4] Justice Holmes, in *Abrams* v. *United States*, 250 U. S. 616, said: "With effervescing opinions, as with champagne, the quickest way to let them fall flat is to let them get exposed to the air."

any wrongs and injustices that result from operation of the law."[5] Were this Court left to its own devices for the engendering motion to set aside erroneous opinions the process may be unduly delayed and with very costly results to the people.[6]

The status of supremacy of this Court under the law in the discharge of its function is well stated by Charles Evans Hughes, thus: "We are under a Constitution, but the Constitution is what the judges say it is." *Addresses and Papers of Charles Evans Hughes* (Putnam, 1916), pp. 185-186.

"The Constitution nowhere provides that it shall be what the judges say it is. . . . What the Constitution does say is: 'The judicial Power shall extend to all cases . . . arising under this Constitution . . .' and that 'This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land.'" (*The Struggle for Judicial Supremacy*, Jackson, pp. 3-4) "Since Lord Chief Justice Coke bluntly told King James that while the King was under no man, he was under God and the law"[7] it must be assumed that "in cases involving the Federal Constitution, where correction through legislative action is practically impossible",[8] erroneous precepts of this Court should be openly challenged by counsel with the boldness of Lord Coke, in the public interest, so that the goal "equal justice under law" may be attained and maintained by this Court.

It is submitted that the decision of this Court is inconsistent with its holding in *West Virginia State Board of*

[5] Quoted from address of Robert H. Jackson, Attorney General of the United States, to the Chief Justice and Associate Justices at the ceremonies in commemoration of the 150th Anniversary of the Supreme Court, February 1, 1940.

[6] Compare *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, overruling an erroneous and unjust rule of ninety-six years' practice started in *Swift* v *Tyson*, 16 Pet. 1, under which millions of dollars had been paid.

[7] Robert H. Jackson, Associate Justice of the Supreme Court of the United States, speaking before The Judicial Section of the New York State Bar Association at New York City, Saturday afternoon January 22, 1944.

[8] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406.

Education v. *Barnette*, 319 U. S. 624, in several particulars. The presumption of invalidity of the law is not applied. The doctrine of clear and present danger of grave injury is ignored. The burden of proof of essential element cast upon the state to prove an abuse of the constitutional right is not considered. Presumption is here substituted for fact, contrary to the opinion in the *Barnette* case, in spite of the fact that the public interest of the state in the welfare of the child is the same. In both cases the activity and presence of the child were public and in a place where regulation is permitted and necessary in the interest of the state. The only differences in the facts which formed the controversy and issues are: In this case it is an overt act, admittedly not harmful in itself but declared so because of the nature of the forum; while in the *Barnette* case it was non-performance of an act. In both cases the action and failure to act are based on the same source of authority and result from a conscience dictated by Jehovah God. In each case the violation of the conscience is believed by the parties involved to bring the same result, that is to say, everlasting death at the hand of Jehovah God. The interests of the state in this case are not any greater than they were in the flag case. The dangers to the child for a violation of the law in this case are no greater than in the flag case. The acts involved in both brought punishment for the parents and the taking of the children away from the parent. For similar reasons the attempt on the part of the Court to distinguish the cases of *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Meyer* v. *Nebraska*, 262 U. S. 390, fails.

The decision in this case and the efforts to distinguish the above cases so as to reach the conclusion here and at the same time to leave them standing in effect erodes and wears those decisions down to the point that they only stand as shadows or vague outlines of what they originally meant. They stand out in the darkness as ghostly forms to confuse and mislead the bench and bar when confronted with the opinion of the Court in this case.

The dissenting opinion of Mr. Justice Jackson in this case, joined in by Justices Roberts and Frankfurter, points out that the line of distinction drawn by the Court, based on age, cuts across the true exercise of freedom of worship and is a wrong and dangerous principle for sustaining the judgment of the Court. It is submitted that the correct conclusion on the law involved in this case is reached by Mr. Justice Murphy in his opinion. The reasons stated and the arguments made by him in his dissent, all of which are incorporated herein by reference, should be adopted as the opinion of this Court.

The misapplication of the law, approved by this Court, to the true worship of the child and appellant is as obnoxious and as unconstitutional as if the Commonwealth of Massachusetts had passed a law declaring that all the first-born children of Jehovah's witnesses within the Commonwealth should be killed to stop the proclamation of Jehovah's kingdom. The law, as applied, is just as unreasonable as the supposed enactment just mentioned. The supposed measure would require argument equally as specious and factitious as those made in support of the misapplication of the child labor law in this case to justify its validity.

The misapplication of the law in this case reminds one of the words of Thomas Jefferson, on granting a pardon to those innocent persons prosecuted and convicted under the Alien and Sedition Laws. He said: "I consider that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship the golden image." *The Story of Cooperstown*, Birdsall, p. 86; *Works*, Jefferson.

The Commonwealth of Massachusetts and its agents whose mind is set upon frustrating and stopping the true and faithful worship of Almighty God Jehovah by little children and His witnesses should pause to consider the futility and vanity of its efforts. The misapplication of the law, and the approval thereof, is well likened to the passage and approval of a law which is enacted to prohibit

Jehovah God in heaven from receiving the worship of His faithful witnesses in the earth. The ridiculousness of such a law is described by David thus: "He that sitteth in the heavens shall laugh: the Lord shall have them in derision." (Psalm 2:4) The State cannot successfully fight against Almighty God. The wise man said: "Can one go upon hot coals, and his feet not be burned?" (Proverbs 6:28) To Saul, later Paul the apostle, the Lord Jesus Christ said: "It is hard for thee to kick against the pricks." (Acts 9:5) Paul confirmed the making of this statement to him by the Lord when defending himself before King Agrippa. (Acts 26:14) Common sense dictates to the soldier using a flame thrower not to discharge it against a heavy wind and be consumed by his own flames.

The wave of juvenile delinquency and flagrant violations of child labor laws that has swept the nation during the fever of total war is an alarming fact. J. Edgar Hoover, Director of the FBI, in a recent radio interview as reported in the *Congressional Record* for December 3, 1943 (p. A5642), states that it was a "grim reality" that in a government survey just completed "actual arrests in 18 leading cities, representing a population of 10,000,000", reflect a "42.7 percent increase in the arrests of boys under 18 years of age and a 43 percent increase in the arrests of girls under 18 years of age in the first 6 months of this year over a corresponding period in 1942. In the face of these facts, I have been amazed to note a tendency on the part of social theorizers and foggy-minded performers to say that juvenile delinquency figures are not as alarming as they sound. In fact, they seek to justify their ostrich-like attitude by saying that the rise in the arrests of youthful offenders is due to increased law enforcement, which is definitely not the case." Mr. Hoover does not lay the blame for this condition upon the war, but points out that the lack of "fundamentals" in the training of these youngsters is to blame. Quoting him further: "The present situation cannot be charged entirely to wartime laxity of morals and a last-fling

philosophy of life. That may be the case with the older violator, but when mere children turn to crime there is a more sinister reason. This condition did not come on us overnight. It is deep-rooted and does not forecast a very bright picture for the future. Something has happened to the moral stamina of America when the conventions and principles of honesty and common decency are regarded as 'old fogey' and 'antique'. There are certain fundamentals in life that are essential."

This Court should take judicial notice of the fact that the activity of the appellant and the child are no part of this rising tide of lawlessness. It is the height of irony to see a Christian mother punished for directing a child in worship when reckless and lawless gangs of teen-aged "zoot-suiters" and other delinquents loiter about the streets of many cities indulging in all manner of depravity and destructive conduct, although exempt from the reach of child labor laws. The activity of the child and appellant does not come from the employment shortage that has forced unscrupulous employers to resort to illegal exploitation of child labor, which has resulted in a multitude of social derangements.[9]

Every person possessed of his faculties of perception realizes that mere strict enforcement of laws against these practices as a remedy is as futile as seeking to prevent bodily ailments by punishing those who are taken ill. Now, in this time of world upheaval, the people, caught in a whirling maelstrom of violence pulling them to a vortex of social abnormalities, are in desperate need of the moral stabilization afforded by the comforting words of assurance from the Holy Bible. Since these activities "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which

[9] The eminent Wisconsin jurist, Roland J. Steinle, recently delivered an enlightening and informative address on the cause of the distressing increase in juvenile delinquency and the present importance of the problem to the future of the nation. It was printed in the *Congressional Record* for February 17, 1944, at page A839.

it could not endure"[10]—thus bearing burdens that would otherwise fall upon the government and general public—it should be the policy of the judiciary as well as other governmental agencies to indulge every possible legal protection for the preaching activity, rather than throw obstacles in the path of such charitable and beneficent activity.

Viewing these alarming national conditions, should those who have the responsibility of applying and construing the laws under the Constitution devote their time and energies to justifying and legalizing the arrest and prosecution of the loving parents who have brought up their children to believe in and respect the law of Almighty God, which has a stronger, more beneficial effect and a more lasting contribution to child welfare and moral integrity of the child than the misapplication of child labor laws? By grotesque misapplication of such social laws the commonwealth has made it a crime for a clean-minded youngster to hand to another child or to an adult on the public street a publication announcing the establishment of Almighty God's blessed Kingdom of righteousness under Christ Jesus, that will forever lift mankind out of the filth and mire of social debasement in which millions of people of all nations wallow. Under the misapplied statute, so heinous is the offense of the little girl and her guardian in the activity of distributing Bible literature pointing young and old to the only way in which they can enjoy these promised blessings, that the guardian who permitted it is dragged to jail and threatened with the enforcement of the further sanctions of the statutes permitting officials to ravish the Christian home by rending asunder the parental relationship and placing the child in the custody of a county training school!

Were these harsh, discordant and unjust results envisioned and intended by the founding fathers, the authors of the Constitution and the people of the states who adopted it as the supreme law of the land?

[10] *Trustees of First M. E. Church South* v. *Atlanta*, 76 Ga. 181, 192.

Before taking the move which may bring this controversy to a close it would do the Court good to consider the remarks of Congressman Ed Gossett of Texas (*Congressional Record* for Feb. 15, 1944, Appendix, pp. A798-A799), who, speaking of these precise conditions, adopted as his text the scripture, "Righteousness exalteth a nation: but sin is a reproach to any people."—Proverbs 14:34.

Conclusion

Wherefore appellant prays that the order and judgment heretofore entered herein affirming the judgments of the courts below, be set aside and held for naught, and that on the briefs heretofore submitted, this petition for rehearing be granted and the Court render an order reversing the judgment of the courts below, or, in the alternative, order the cause to be reargued orally. Appellant prays for such other relief as she may show herself justly entitled to in the premises.

SARAH PRINCE, *Appellant*

By HAYDEN C. COVINGTON
ALFRED A. ALBERT
Counsel for Appellant

Certificate

The undersigned counsel for appellant hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Appellant

SUPREME COURT OF THE UNITED STATES.

No. 98.—October Term, 1943.

Sarah Prince, Appellant, vs. Commonwealth of Massachusetts.	Appeal from the Superior Court of Massachusetts, Plymouth County.

[January 31, 1944.]

Mr. Justice Rutledge delivered the opinion of the Court.

The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority. This time Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.

When the offenses were committed she was the aunt and custodian of Betty M. Simmons, a girl nine years of age. Originally there were three separate complaints. They were, shortly, for (1) refusal to disclose Betty's identity and age to a public officer whose duty was to enforce the statutes; (2) furnishing her with magazines, knowing she was to sell them unlawfully, that is, on the street; and (3) as Betty's custodian, permitting her to work contrary to law. The complaints were made, respectively, pursuant to Sections 79, 80 and 81 of Chapter 149, Gen. Laws of Mass. (Ter. Ed.). The Supreme Judicial Court reversed the conviction under the first complaint on state grounds;[1] but sustained the judgments founded on the other two.[2] 313 Mass. 223. They present the only questions for our decision. These are whether Sections 80 and 81, as applied, contravene the Fourteenth

[1] The court found there was no evidence that appellant was asked Betty's age. It then held that conviction for refusal to disclose the child's name, based on the charge under Section 79, would violate Article 12 of the Declaration of Rights of the Commonwealth, which provides in part: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself."

[2] Appellant received moderate fines on each complaint, first in the District Court of Brockton, then on pleas of not guilty by trial *de novo* without a jury in the Superior Court for Plymouth County. Motions to dismiss and quash the complaints, for directed findings, and for rulings, were made seasonably and denied by the Superior Court.

Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws.

Sections 80 and 81 form parts of Massachusetts' comprehensive child labor law.[3] They provide methods for enforcing the prohibitions of Section 69, which is as follows:

No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.

Sections 80 and 81, so far as pertinent, read:

Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months or both. [Section 80]

Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive . . . shall for a first offense be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both; . . . [Section 81].

The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years. Mrs. Prince, living in Brockton, is the mother of two young sons. She also has legal custody of Betty Simmons, who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute "Watchtower" and "Consolation," according to the usual plan.[4] She had permitted the children to engage in this activity previously, and had been warned against doing so by the school

[3] Mass. Gen. Laws (Ter. Ed.) c. 149, as amended by Acts and Resolves of 1939, c. 461.

[4] Cf. the facts as set forth in Jamison v. Texas, 318 U. S. 413; Largent v. Texas, 318 U. S. 418; Murdock v. Pennsylvania, 319 U. S. 105; Busey v. District of Columbia, 129 F. 2d 24 (App. D. C.). A common feature is that specified small sums are generally asked and received but the publications may be had without the payment if so desired.

attendance officer, Mr. Perkins. But, until December 18, 1941, she generally did not take them with her at night.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children "to engage in the preaching work with her upon the sidewalks." That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passersby to see, copies of "Watch Tower" and "Consolation." From her shoulder hung the usual canvas magazine bag, on which was printed "Watchtower and Consolation 5¢ per copy." No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

Mrs. Prince and Betty remained until 8:45 p.m. A few minutes before this Mr. Perkins approached Mrs. Prince. A discussion ensued. He inquired and she refused to give Betty's name. However, she stated the child attended the Shaw School. Mr. Perkins referred to his previous warnings and said he would allow five minutes for them to get off the street. Mrs. Prince admitted she supplied Betty with the magazines and said, "[N]either you nor anybody else can stop me . . . . This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands." However, Mrs. Prince and Betty departed. She remarked as she went, "I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed." It may be added that testimony, by Betty, her aunt and others, was offered at the trials, and was excluded, to show that Betty believed it was her religious duty to perform this work and failure would bring condemnation "to everlasting destruction at Armageddon."

As the case reaches us, the questions are no longer open whether what the child did was a "sale" or an "offer to sell" within Section 69[5] or was "work" within Section 81. The state court's

[5] In this respect the Massachusetts decision is contrary to the trend in other states. Compare State *v.* Mead, 230 Iowa 1217; State *v.* Meredith, 197 S. C. 351; State *ex rel.* Semansky *v.* Stark, 196 La. 307; City of Shreveport *v.* Teague, 200 La. 679; People *v.* Barber, 289 N. Y. 378; Thomas *v.* City of Atlanta, 59 Ga. App. 520; City of Cincinnati *v.* Mosier, 61 Ohio App. 81. *Contra:* McSparran *v.* City of Portland (Circuit Court, Multnomah County, Oregon, June 8, 1942), cert. denied, 318 U. S. 768.

decision has foreclosed them adversely to appellant as a matter of state law.[6] The only question remaining therefore is whether, as construed and applied, the statute is valid. Upon this the court said: "We think that freedom of the press and of religion is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places by boys under twelve and girls under eighteen, and in the further statutory provisions herein considered, which have been adopted as a means of enforcing that prohibition." 313 Mass. 223, 229.

Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be restricted as Massachusetts has done.[7] Hence, she rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.[8] Cf. *Meyer* v. *Nebraska*, 262 U. S. 390. These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is "to preach the gospel . . . by public distribution" of "Watchtower" and "Consolation," in conformity with the scripture: "A little child shall lead them."

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[6] The court's opinion said: "The judge could find that if a passerby should hand over five cents in accordance with the sign on the bag and should receive a magazine in return, a sale would be effected. The judge was not required to accept the defendant's characterization of that transaction as a 'contribution.' He could believe that selling the literature played a more prominent part in the enterprise than giving it way. He could find that the defendant furnished the magazines to Betty, knowing that the latter intended to sell them, if she could, in violation of § 69 . . . . The judge could find that the defendant permitted Betty to 'work' in violation of § 81 . . . . [W]e cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature." 313 Mass. 223, 227-228.

[7] Appellant's brief says: "The purpose of the legislation is to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children." And at the argument counsel stated the prohibition would be valid as against a claim of freedom of the press as a nonreligious activity.

[8] The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter.

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in *West Virginia State Board of Education* v. *Barnette*,

319 U. S. 624. Previously in *Pierce* v. *Society of Sisters*, 268 U. S. 510, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in *Meyer* v. *Nebraska*, 262 U. S. 390, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce* v. *Society of Sisters, supra.* And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance,[9] regulating or prohibiting the child's labor,[10] and in many other ways.[11] Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.[12] The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People* v. *Pierson*, 176 N. Y. 201.[13] The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

[9] State v. Bailey, 157 Ind. 324; compare Meyer v. Nebraska, 262 U. S. 390; Pierce v. Society of Sisters, 268 U. S. 510; West Virginia State Board of Education v. Barnette, 319 U. S. 624.

[10] Sturges & Burn Mfg. Co. v. Beauchamp, 231 U. S. 320; compare Muller v. Oregon, 208 U. S. 412.

[11] Cf. People v. Ewer, 141 N. Y. 129.

[12] Jacobson v. Massachusetts, 197 U. S. 11.

[13] See also State v. Chenoweth, 163 Ind. 94; Owens v. State, 6 Okla. Cr. 110.

But it is said the state cannot do so here. This, first, because when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger, cf. *Schenck* v. *United States*, 249 U. S. 47; and, it is added, there was no such showing here. The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of validity. Cf. *Schneider* v. *State*, 308 U. S. 147. And, finally, it is said, the statute is, as to children, an absolute prohibition, not merely a reasonable regulation, of the denounced activity.

Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. *Young* v. *California*, 308 U. S. 147; *Nichols* v. *Massachusetts*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *City of Struthers*, 319 U. S. 141.[14] But the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a "sale" or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command.

The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within

[14] Pertinent also are the decisions involving license features: Lovell v. City of Griffin, 303 U. S. 444; Schneider v. State, 308 U. S. 147; Hague v. Congress of Industrial Organizations, 307 U. S. 496.

a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment,[15] more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.[16] It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. This is so not only when children are unaccompanied but certainly to some extent when they are with their parents. What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.

Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses.[17] But, for obvious reasons, notwithstanding appellant's contrary view,[18] the validity of such a prohibition applied to children not accompanied by an older person hardly would seem open to question. The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious,

[15] See, e. g., Volumes 1-4, 6-8, 14, 18, Report on Condition of Women and Child Wage Earners in the United States, Sen. Doc. No. 645, 61st Cong., 2d Sess.; The Working Children of Boston, U. S. Dept. of Labor, Children's Bureau Publication No. 89 (1922); Fuller, The Meaning of Child Labor (1922); Fuller and Strong, Child Labor in Massachusetts (1926).

[16] See e. g. Clopper, Child Labor in City Streets (1912); Children in Street Work, U. S. Dept. of Labor, Children's Bureau Publication No. 183 (1928); Children Engaged in Newspaper and Magazine Selling and Delivering, U. S. Dept. of Labor, Children's Bureau Publication No. 227 (1935).

[17] **Cox v. New Hampshire**, 312 U. S. 569; Chaplinsky v. New Hampshire, 315 U. S. 568.

[18] Although the argument points to the guardian's presence as showing the child's activities here were not harmful, it is nowhere conceded in the briefs that the statute could be applied, consistently with the guaranty of religious freedom, if the facts had been altered only by the guardian's absence.

political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.

In so ruling we dispose also of appellant's argument founded upon denial of equal protection. It falls with that based on denial of religious freedom, since in this instance the one is but another phrasing of the other. Shortly, the contention is that the street, for Jehovah's Witnesses and their children, is their church, since their conviction makes it so; and to deny them access to it for religious purposes as was done here has the same effect as excluding altar boys, youthful choristers, and other children from the edifices in which they practice their religious beliefs and worship. The argument hardly needs more than statement, after what has been said, to refute it. However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do.

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation "for any [that is, every] state intervention in the indoctrination and participation of children in religion" which may be done "in the name of their health and welfare" nor give warrant for "every limitation on their religious

training and activities." The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.

The judgment is

Affirmed.

Mr. Justice MURPHY, dissenting.

This attempt by the state of Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained.

The record makes clear the basic fact that Betty Simmons, the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity. She was a member of Jehovah's Witnesses and had been taught the tenets of that sect by her guardian, the appellant. Such tenets included the duty of publicly distributing religious tracts on the street and from door to door. Pursuant to this religious duty and in the company of the appellant, Betty Simmons on the night of December 18, 1941, was standing on a public street corner and offering to distribute Jehovah's Witness literature to passersby. There was no expectation of pecuniary profit to herself or to appellant. It is undisputed, furthermore, that she did this of her own desire and with appellant's consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God. She was occupied, in other words, in "an age-old form of missionary evangelism" with a purpose "as evangelical as the revival meeting." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108, 109.

Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare. Our problem here is whether a state, under

Dissenting opinion of Mr Justice Murphy should follow concurring opinion of Mr Justice Jackson appearing on page 14.

the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. No question of freedom of speech or freedom of press is present and we are not called upon to dete mine the permissible restraints on those rights. Nor are any truancy or curfew restrictions in issue. The statutes in question prohibit all children within the specified age limits from selling or offering to sell "any newspapers, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place." Criminal sanctions are imposed on the parents and guardians who compel or permit minors in their control to engage in the prohibited transactions. The state court has construed these statutes to cover the activities here involved, cf. *State* v. *Richardson*, 27 A. 2d 94, thereby imposing an indirect restraint through the parents and guardians on the free exercise by minors of their religious beliefs. This indirect restraint is no less effective than a direct one. A square conflict between the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children is thus presented.

As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.

In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by

those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.

The burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general. The great interest of the state in shielding minors from the evil vicissitudes of early life does not warrant every limitation on their religious training and activities. The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the reasonableness that justifies such a drastic restriction when the distribution is part of their religious faith. *Murdock* v. *Pennsylvania, supra,* 111. If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639. The vital freedom of religion, which is "of the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325, cannot be erased by slender references to the state's power to restrict the more secular activities of children.

The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. It was carried on in an orderly, lawful manner at a public street corner. And "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas,* 318 U. S. 413, 416. The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. Such use of the streets is as necessary to the Jehovah's Witnesses, the Salvation Army and others who practice religion without benefit of conventional shelters as is the use of the streets for purposes of passage.

It is claimed, however, that such activity was likely to affect adversely the health, morals and welfare of the child. Reference is made in the majority opinion to "the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street." To the extent that they flow from participation in ordinary commercial activities, these harms are irrelevant to this case. And the bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial. Cf. *Bridges* v. *California*, 314 U. S. 252, 262. Yet there is not the slightest indication in this record, or in sources subject to judicial notice, that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any of the harmful "diverse influences of the street." Indeed, if probabilities are to be indulged in, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Gambling, truancy, irregular eating and sleeping habits, and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations. Moreover, Jehovah's Witness children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least. And the fact that the zealous exercise of the right to propagandize the community may result in violent or disorderly situations difficult for children to face is no excuse for prohibiting the exercise of that right.

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and

unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, "Jehovah's Witnesses Mold Constitutional Law," 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

Mr. Justice Jackson.

The novel feature of this decision is this: the Court holds that a state may apply child labor laws to restrict or prohibit an activity of which, as recently as last term, it held: "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion." ". . . the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109, 111.

It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets "occupy the same high estate" and have the "same claim to protection" it would seem that child labor laws may be applied to both if to either. If the *Murdock* doctrine stands along with today's decision, a foundation is laid for any state interven-

Mr. Justice Jackson's opinion should start on opinion of the Court and appear at page 10.

tion in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.

This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Jones* v. *Opelika*, 316 U. S. 584, 319 U. S. 103; *Douglas* v. *Jeannette*, 319 U. S. 157. Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom.

My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.

The Court in the *Murdock* case rejected this principle of separating immune religious activities from secular ones in declaring the disabilities which the Constitution imposed on local authorities. Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities. I think this is not a correct principle for defining the activities immune from regulation on grounds of religion, and *Murdock* overrules the grounds on which I think affirmance should rest. I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts. 313 Mass. 223.

Mr. Justice ROBERTS and Mr. Justice FRANKFURTER join in this opinion.